Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

CASE NO. 82-754

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

-v-

DANIEL LOWELL COLER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

JIM SMITH
Attorney General

GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

QUESTION PRESENTED

WHETHER AFTER THE STATE OF FLORIDA NOLLE PROSSED THE PROSECUTION AGAINST RESPONDENT, A CASE OR CONTROVERSY STILL EXISTS WITH RESPECT TO THE ISSUES PRESENTED BY PETITIONER, THE STATE OF FLORIDA.

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ISSUE

QUESTION PRESENTED

WHETHER AFTER THE STATE OF FLORIDA NOLLE PROSSED THE PROSECUTION AGAINST RESPONDENT, A CASE OR CONTROVERSY STILL EXISTS WITH RESPECT TO THE ISSUES PRESENTED BY PETITIONER, THE STATE OF FLORIDA.

Respondent has presented the Court with an intervening matter, to-wit: the State's entry of a nolle prosequi in the case of State v. Daniel Lowell Coler in the Circuit Court of Duval County, Florida. While respondent factually states that this nolle prosequi was entered, he is equally correct in stating that this does not prevent prosecution.

The State of Florida, petitioner, can state that one of the principal reasons a nolle prosequi was entered was the refusal of the victim, respondent's daughter, to take the stand against respondent. That

particular situation can change and a further prosecution is not impossible.

Without retreating from the position that a prosecution of respondent is a possibility, it is clear that this question is one that will evade review if this Court does not grant a writ of certiorari. In compliance with the Florida Supreme Court's ruling, trial judges will not return sentences of death under § 794.011, F.S. (1977). Under the rationale outlined by this Court in Gerstein v. Pugh, 420 U.S. 103 (1974), the importance of this issue, coupled with the fact that it will evade review, requires that the writ be granted.

Lastly, this issue is one that must be decided by this Court because of the irreconcilable conflict between the Supreme Court of Mississippi, Upshaw v. State, 350 So.2d 1358 (Miss. 1977), and the Florida

Supreme Court on the same question of federal constitutional law. The Florida Supreme Court struck down the death penalty herein squarely on federal constitutional grounds stating: ". . . a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and therefore forbidden by the Eighth Amendment as cruel and unusual." The Supreme Court of Mississippi, in Upshaw, supra, upheld the death penalty imposed under a nearly identical statute, stating that the penalty is not prohibited by the Eighth Amendment. The Florida Supreme Court is not supreme on federal constitutional questions. That is the preroyative of this court, and is the reason why this Court should grant the writ.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that contained in the Petition for Writ of Certiorari, petitioner would respectfully request that this Honorable Court grant the writ.

JIM SMITH
Attorney General

GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Response to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32302, by hand-delivery, this 17th day of December 1982.

GREGORY C. SMITH
Assistant Attorney General

of Counsel